91-1817

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CASE NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

_____ TERM

ADAM CAB, INC. d/b/a
ADAM CAB COMPANY,
Appellant

v.

MARCUS E. COLLINS, SR.,
STATE REVENUE COMMISSIONER,
STATE OF GEORGIA
Appellee

ON APPLICATION TO THE SUPREME COURT
OF THE STATE OF GEORGIA FOR
DISCRETIONARY APPEAL

PETITION FOR WRIT OF CERTIORARI

FRED S. CLARK
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QUESTIONS PRESENTED FOR REVIEW

Where the State Revenue Commissioner promulgated Revenue Regulation 560-12-2-.84(7)(b) imposing the responsibility for the collection and remittance of sales tax on passenger fares upon taxi cab companies rather than their leasehold operators over whom they have no control or power to enforce reporting, collection or remittance of the tax and thereby place the responsibility on taxi cab companies with leasehold drivers for the improper conduct of another did this deprive them of their property in violation of the due process clauses of the United States and the State of Georgia Constitutions?

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LIST OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

1. Order of Superior Court of Chatham County, State of Georgia, dated July 31, 1990.
2. Opinion of Supreme Court of Georgia, dated June 7, 1991.
3. Order of Superior Court of Chatham County, State of Georgia, dated October 29, 1991.
4. Denial of Application for Discretionary Review, dated December 18, 1991.
5. Denial of Application for Reconsideration, dated January 8, 1992.

6. Amended Order of Denial of Application for Reconsideration, dated January 15, 1992.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

Jurisdiction of this Court is invoked on the grounds that the Supreme Court of the State of Georgia has denied Appellant's Application for Discretionary Appeal, thereby making the Order of the Superior Court of Chatham County a final judgment, which is in conflict with the judgments of the Supreme Courts of sister states on similar statutes.

(i) **OCTOBER 29, 1991:** Order of the Superior Court of Chatham County, State of Georgia;

(ii) **DECEMBER 18, 1991; JANUARY 8, 1992 and JANUARY 15, 1992:** Supreme Court of the State of Georgia Denial of Application

for Discretionary Appeal, Denial of Application for Reconsideration, and Amended Denial of Application for Reconsideration, respectively.

(iii) **SUPREME COURT RULE 10.1.(b):** which provides for jurisdiction when final judgments of a state court of last resort has decided a question pertaining to the validity of a State statute on the ground that it is repugnant to the Constitution of the United States, conflicts with the decision of another state court of last resort.

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED IN THE CASE

State of Georgia Revenue Regulation 560-12-2-.84(2)

"Additionally, lessees or rentees of taxicabs shall collect the tax on fares for transportation of persons in accordance with the uniform bracket system. Said lessees or rentees shall pay the tax on charges for the lease or rental of tangible property and fares collected for transportation of persons to their lessors or rentors and said lessors or rentors shall remit same to the State Revenue Commissioner."

(Underscoring provided for emphasis)

State of Georgia Revenue Regulation 560-12-2-.84(7)(b)

"Due to the likelihood that the State would otherwise lose tax funds due to the difficulty of policing the business operations of taxicab drivers because of the nature of the business, the lack of an office or regular place of business and the turnover of drivers, headquarters operators and lessors of taxicabs shall collect the tax on fares for transportation of persons from their drivers as required above, and the term 'headquarters

operators' includes not only any person operating a headquarters for taxicabs and supervising or directing taxicab drivers, or receiving and relaying calls to cab driver members, but also any person or entity allowing use of the trade name of the headquarters or allowing any driver to hold himself out as being associated with the headquarters. The term 'taxicab lessors' includes any person or entity leasing a vehicle to another person or entity for use as a taxicab." (underscoring provided for emphasis)

Fifth Amendment to the Constitution of the United States of America

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property,

without due process of law; nor shall private property be taken for public use, without just compensation." (underscoring provided for emphasis)

Fourteenth Amendment to the Constitution of the United States of America

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (underscoring provided for emphasis)

Article I, Section I, Paragraph I of the Constitution of the State of Georgia

> *"Life, liberty, and property. No person shall be deprived of life, liberty, or property except by due process of law."* (underscoring provided for emphasis)

Article I, Section I, Paragraph II of the Constitution of the State of Georgia

> *"Protection to person and property, equal protection. Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws."*

O.C.G.A. § 48-8-1

"It is the intention of the General Assembly in enacting this article to exercise its full and complete power to tax the retail purchase, retail sale, rental, storage, use, and consumption of tangible personal property and the services described in this article except to the extent prohibited by the Constitution of the United States and of this state and except to the extent of specific exemptions provided in this article."

STATEMENT OF THE CASE

This case involves the appeal of a tax assessment issued by the Georgia Department of Revenue against Adam Cab Company for failure to remit sales tax on fares for transportation to the Department of Revenue for the period January 1, 1986, through November 30, 1986. In its appeal of the Department of Revenue's assessment, Adam Cab Company challenged the constitutionality of Revenue Regulation 560-12-2-.84(7)(b) as well as the amount of the tax assessment.

In cross-motions for summary judgment, the parties asked the trial court to determine the validity of Revenue Regulation No. 560-12-2.-84(7)(b) as applied by the Department of Revenue in

assessing Adam Cab Company for failure to collect and remit sales tax on fares for transportation. In an order dated July 31, 1990, the lower court granted in part Adam Cab Company's motion for summary judgment and denied the State Revenue Commissioner's motion for partial summary judgment.

In its initial order the trial court, adopting an interpretation of the Regulation differing from that employed by the Department of Revenue, found that the Regulation required Adam Cab Company to collect from its drivers only that sales tax that its drivers "actually" collected from passengers. According to the court, the language of the Regulation places the responsibility for collection of sales tax

on those parties who deal directly with passengers or who otherwise have the opportunity to exercise control over the collection of taxes. Because the court found that Adam Cab Company did not deal directly with the passengers or have control over its drivers, the court concluded that Adam Cab Company was only responsible for collecting those sales taxes which were actually collected by the drivers.

In denying the State Revenue Commissioner's motion for partial summary judgment, the court found that the State Revenue Commissioner erred in interpreting the Regulation as making Adam Cab Company responsible for collecting sales tax on all fares for transportation regardless of

whether its drivers collected the sales tax. Based upon its interpretation of the Regulation, the Court concluded that it did not need to address the constitutional challenge raised by Adam Cab Company's appeal and briefed in the parties' summary judgment briefs.

In the Supreme Court of Georgia's initial ruling (***Collins, Commr. v. Adam Cab, Inc., d/b/a Adam Cab Co.***, 261 Ga. 305, 404 SE2d 560) it held that the appellant qualified as a headquarters operator and a taxi cab lessor under the amended Regulation and required Adam Cab Company to remit to the State Revenue Commissioner the tax on fares actually collected by its independent contractor drivers. Holding that public policy was

not considered (by the lower Court) and the need to collect the tax on fares for transportation of customers and the impracticability or impossibility of the taxi cab drivers collecting and remitting the fares warranted the Court holding that the Regulation is valid and Adam Cab Company was bound by it. However, the Court in Division Two ruled as follows: "Our ruling in Division One does not require the grant of summary judgment to Appellant. This case must be remanded to the trial Court for consideration and resolution of the Constitutional issues raised by Appellee but not ruled upon by the trial court.

After remand the trial court held that the Regulation is constitutional

stating that the case of ***Frankel v. Cone***, 214 Ga. 733, as presented by the Appellant raised "interesting issues, this court, without further guidance from the higher courts of this state, is not in a position to apply [it] . . . to taxes."

Appellant thereafter filed an Application for Discretionary Appeal in the Supreme Court of Georgia, which was denied by a vote of four to three. The dissenting Justices included the Chief Justice, the presiding Justice and a third Justice. [A copy of this unpublished opinion is attached as Appendix D]

On Motion for Reconsideration, the Court voted to deny the Motion for Reconsideration (which was subsequently

amended). [Copies of this opinion and its amendment are attached as Appendix E and Appendix F respectively]

The constitutionality of the subject Regulations was first raised in the Appellant's initial Appeal to the Superior Court of Chatham County, State of Georgia as Paragraph 2 thereof, reading [in pertinent part]:

> "2. Basing an assessment against Appellant under an apparent "misinterpretation" of the above quoted portion of the Regulations is unconstitutional under the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I,

Section I, Paragraphs I and II of the Constitution of the State of Georgia, in that it is a deprivation of property without due process [i.e., holding Appellant liable for taxes on fares which are properly collectible and payable by the independent contractor "lessees" of the Appellant's vehicles, under the provisions of Regulation 560-12-2-.84(2)], ..."

ARGUMENT FOR GRANTING THE WRIT

This Court should grant certiorari because the Georgia Supreme Court has erroneously required taxi cab companies with leasehold drivers to be responsible for the collection and remittance of sales tax on passenger fares upon the companies rather than the drivers. This ignores the practical operation of the industry, namely, the operators are not subject to the company's right to direct the time, the manner, the methods and the means of execution of the work; the companies cannot compel the taxi cab drivers by agreement, policy or law to report the fares to the company and most important most passengers refuse to pay the sales tax when requested by the drivers. (See

Affidavits of Hendrix and Sapp, leasehold drivers, Appendix G and H respectively) Therefore, the companies are being held responsible for the improper conduct of another and are thereby being deprived of their property in violation of the due process clauses of the United States and the State of Georgia Constitutions. The decision is in conflict with other laws in the State of Georgia and the issues are of far reaching importance as they thereby create a conflict between Georgia and contrary rulings in:

MINNESOTA: *Corbin v. Commissioner*, 307 Minn. 237, 240 NW2d 809; *Fridlund Securities Co. v. Minnesota Commissioner of Revenue*, ____ Minn. _____, 430 NW2d 154;

WYOMING: *Employment Security Commissioner of Wyoming v. Laramie Cabs, Inc.*, 700 P.2d 399;

FLORIDA: *Noreiga v. Schnurmacher Holding, Inc.*, 528 SO2d 28); and,

ALABAMA: *Alabama v. Advertiser Co.*, 337 SO2d 942).

Revenue Regulation 560-12-2-.84(7)(b) is unconstitutional in that it deprives taxi cab companies of their property without due process of law in that taxi cab companies are held liable for the improper conduct of independent contractors over whom they have no right or opportunity or authority to exercise control nor the authority to require them to report their fares, to collect taxes or to pay the taxes if any are collected.

The Regulation is in violation of the due process clauses of the United States and State of Georgia Constitutions. This argument was presented in the pleadings and brief in the lower court.

The Supreme Court of Georgia has ruled that other legislation which had the same effect, was unconstitutional. ***Frankel v. Cone***, 214 Ga. 733. The statue in question in the cited case made the owner of a motor vehicle liable if the vehicle was used for the prosecution of the business of or for the benefit of such owner even though operated without the owner's knowledge or consent, express or implied. Former Ga. Code Ann., 68-301. The court stated, "In our opinion, the act clearly violates the due process

clause of both the Federal and State Constitutions for the reason that it makes the owner of a motor vehicle liable if the vehicle is being used in the prosecution of the business of or for the benefit of such owner, even though operated without notice to her or without her knowledge or without her consent express or implied. To hold this statute constitutional, would be to hold a party liable for the negligent act of another, even though a trespasser was operating the vehicle against the express orders of the owner, and irrespective of how careful or free from negligence the owner was, the only condition being that it be operated for the benefit of the owner. ***Frankel v. Cone***, 214 Ga. 733, at Page 736.

Similar rulings included the case of ***Corley v. Lewless***, 227 Ga. 745, where this Court held that a statute imposing liability on a parent for wilful and wanton acts of a minor child was unconstitutional. The opinion stated that Georgia Code Ann. 105-113 violated the due process clause of the State and Federal Constitutions. In that case the court stated, "It (Ga. Code Ann. 105-113) imposes vicarious tort liability solely on the basis of the parent child relationship. The requirements that the parents have "custody and control" over the child and that the child's act be wilful and wanton, do not alter the fact that merely because of the relationship of parent and child, a tort liability is

created which otherwise would not exist. It would not matter that the parent was entirely free from negligence or fault or even that he had no knowledge of his child's tort. This was held to be unconstitutional. The Court discussed the rulings in several other cases including ***Frankel v. Cone*** which has been discussed. The court also stated, "In ***Buchanan v. Heath***, 210 Ga. 410, 80 SE2d 393, we held unconstitutional a statute (Ga. Code Ann. 94-707) which made a railroad section foreman liable to pay owners double the value of stock killed on his section for his failure to file a list of the marks and plans of the stock killed, irrespective of whether he had knowledge that the stock had been killed. We held

that the due process clauses of the State and Federal Constitution were violated because the section foreman was automatically made liable by his failure to file a list of stock killed, regardless of any mitigating circumstances which might exist. . . . liability was created solely by virtue of the statue, regardless of whether the section foreman was at fault or even had knowledge that stock had been killed. Also applicable is the ruling in ***Lloyd Adams, Inc. v. Liberty Mut. Ins. Co.***, 190 Ga. 633, 641; 10 SE2d 46, 51, where this court stated: 'To allow any recovery on the basis stated by the statute would deprive the defendant of property without due process of law, would authorize a recovery without

liability, and would compel payment without fault.' These cases are controlling and in our opinion Ga. Code Ann. 105-113 contravenes the due process clauses of the State and Federal Constitutions. (Ga Code Ann. §§1-815, 2-103, Constitution, Article I, Section I, Paragraph 3) and is void." ***Corley v. Lewless***, 227 Ga. 745, 750-1, 182 SE2d 766, 770.

The Supreme Court of Georgia's ruling of June 7, 1991, implies either that the owners have control of some type over the leaseholder drivers or are capable of paying the tax themselves. Yet, the Georgia Court of Appeals expressly stated in Workers' Compensation law a taxi cab driver who rented the cab company's

vehicle and retained all money collected as fares with the company maintaining and insuring the cab with the claimant buying the gasoline was not an employee within the Workers' Compensation law even though the bailment could be terminated at any time. ***Cole v. Peachtree Cab Co.***, 121 Ga. App. 177, 173 SE2d 278. There is no doubt that the driver in this and the cited case was an independent contractor. For "the true test whether a person employed under the contract, whether oral or written has a right to direct the time, the manner, the methods and the means of the execution of the work as contra-distinguished from the right to insist upon the contractor producing results according to the contract or

whether the contractor in the performance of the work contracted for is free from any control by the employer of the time, manner and method of the performance of the work . . . the right to control the manner and method means the right to tell the employee how he shall go about doing the job in every detail including what tools he shall use and what procedures he shall follow." ***R.B.F. Holding Co. v. Williamson***, 260 Ga.526, 397 SE2d 440, 441. The opinion in ***Collins, Commissioner, v. Adam Cab***, Id., puts the taxi cab company in a position that could only be maintained by having the operator as an employee. This has created a divergence in the interpretation of an independent contractor as it applies to taxi cab

lessees in Workers' Compensation and Public Revenue law. For the Revenue Commissioner to contend the taxi cab company should pay the taxes whether collected and turned in to the company or not is contrary to the United States and Georgia Constitutions by taking the property without due process of law. Likewise, the Regulation holds the taxi cab company liable irrespective of whether the taxi cab company had knowledge of whether the driver charged or collected fares and charged or collected sales taxes. Likewise, the Regulation creates a liability on the taxi cab companies regardless of any mitigating circumstances but solely by virtue of the Regulation. It is submitted that to

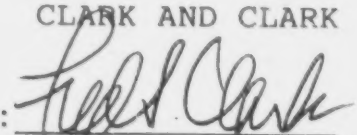
allow the Regulation to be declared constitutional would create a dichotomy of law and would deprive the Appellant of property without due process of law and would authorize payment without liability and compel payment without fault, all of which was prohibited by this Court.

This case is important to all taxi cab companies in the State of Georgia who lease their cabs to independent contractor operators in that it places a burden on the companies to collect taxes from independent contractors over whom they have no right or opportunity or authority to exercise control nor the authority to require them to report their fares, to collect the taxes or to pay the taxes if any are collected.

In addition, it is important to nullify the dichotomy among the States created by the Supreme Court of Georgia.

Respectfully submitted,

CLARK AND CLARK

By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a true and correct copy of the foregoing Petition for Certiorari, to the below named individuals by depositing same in the United States Mail, with adequate postage affixed thereto:

Richard C. Litwin
Office of the Attorney General
State Capitol Sq., Suite 132
Atlanta, GA 30334-1300

Marcus E. Collins, Sr.,
State Revenue Commissioner
270 Washington St., S.W.
Room 410
Atlanta, GA 30314

Hon. Max Cleland
Secretary of State
State Capitol, Room 214
Atlanta, GA 30334

This the 7th day of February, 1992.

Fred S. Clark

91-1317 (2)

Supreme Court, U.S.
FILED
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D Denial of Application for Discretionary Review, dated December 18, 1991.

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G Affidavit of Roger R. Hendrickes, which was a part of the Record on Appeal.

H Affidavit of John Sapp, which was a part of the Record on Appeal.

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K Appellant's Supplemental Brief and Reply Brief to Appellee's Motion for Partial Summary Judgment.

L Appellee's Motion for Partial Summary Judgment in the trial Court.

M Affidavit of Martin J. Koncul, which was a part of the Record on Appeal.

IN THE SUPERIOR COURT,
EASTERN JUDICIAL CIRCUIT, GEORGIA

Adam Cab Inc., d/b/a Adam Cab Company,	)	
Appellant	)	
v.	)	Civil Action X89-2026-B
Marcus E. Collins, Sr., State Revenue Commissioner,	)	
Appellee	)	

ORDER ON APPELLEE'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND APPELLANT'S MOTION FOR SUMMARY JUDGMENT

Having considered the above motions of Appellee and Appellant and the entire record in this action, the Court rules as follows:

Appellee's motion for partial summary judgment is DENIED.

Appellant's motion for summary

judgment is GRANTED in part and DENIED in part as set forth below.

Appellant (Adam Cab) has appealed to this Court for judicial review of the sales tax, plus penalties and interest, assessed against it by the decision of Appellee (Revenue Commissioner) dated May 31, 1989, covering taxes generated from taxicab fares for the period of January 1, 1986 through November 30, 1986. The appeal is a de novo proceeding brought pursuant to the procedure set out in O.C.G.A. 48-2-59. Undercofler v. White, 113 Ga.App. 853, 149 S.E.2d 845 (1986)

This case deals with the effect of Department of Revenue Regulation 560122-.84(7)(b) on Adam Cab's responsibility to collect and remit sales tax on taxicab

fares generated by drivers who lease the taxicabs from Adam Cab. The section of the regulation at issue provides:

> "(b) Due to the likelihood that the State would otherwise lose tax funds due to the difficulty of policing the business operations of taxicab drivers because of the nature of the business, the lack of an office or regular place of business, and the turnover of drivers, headquarters operators and lessors of taxicabs shall collect the tax on fares for transportation of persons from their drivers as required above, and the term "headquarters operators" includes not only any person operating a headquarters for taxicabs and supervising or directing taxicab drivers, or receiving and relaying calls to taxicab driver members, but also any person or entity allowing use of the trade name of the headquarters or allowing any driver to hold himself out as being associated with the headquarters. The term "taxicab lessors" includes any person or entity leasing a vehicle to

another person or entity for use as a taxicab."

Department of Revenue Regulation 560-12-2-.84(7)(b)

It is undisputed that during the period in question Adam Cab acted as a "headquarters operator" and "taxicab lessor" by leasing cabs bearing the Adam Cab logo to drivers and relaying calls to the drivers, who charged fares for the transportation of persons. It is also undisputed that during the period at issue Adam Cab did not collect all of the sales tax on fares generated by the drivers. The Revenue Commission takes the position that Regulation 560-12-2-.84(7)(b) makes Adam Cab liable for the collection of all sales tax on fares generated by the Adam Cab drivers, whether or not the drivers

actually collected the fares from the passengers. By his motion for partial summary judgment, the Revenue Commissioner seeks an order declaring that the regulation, as so interpreted, provides adequate due process to Adam Cab and therefore is lawful under the State and Federal Constitutions. In its appeal, Adam Cab asserted that the regulation, as interpreted by the Revenue Commissioner, would be unconstitutional deprivation of property without due process. In its motion for summary judgment Adam Cab claims that the Revenue Commissioner has misinterpreted the regulation and that it cannot be held responsible for the tax deficiency, since it exercises no control over the drivers, who are employed as

independent contractors, and who have the only opportunity to collect the sales tax from the passengers.

There are apparently no Georgia cases interpreting the application of Revenue 560-12-2-.84(7)(b) under the circumstances of this case. The Court looks to the language of the regulation, which provides in part, ". . . headquarters operators and lessors of taxicabs shall collect the tax on fares for transportation of persons from their drivers as required above . . ." (emphasis supplied). If the drivers were servant employees of Adam Cab, over which control could be exercised, then Adam Cab's liability for sales taxes, which its servant drivers failed to collected, would be clear. In a

master-servant context, Adam Cab would be capable of and responsible for exercising the control over its employee drivers necessary to insure that the sales tax is collected from the passengers. However, if Adam Cab employed its drivers as independent contractors, then it could exercise no control over the time, manner and method of the driver's work and, therefore, would have no control over the collection of the tax. See, Fidelity & Casualty Co. of N.Y. v. Windham, 209 Ga. 592, 74 S.E.2d 835 (1953). In this case, the regulatory requirement that taxes be collected "from their drivers" can only mean that Adam Cab is responsible to collect from the drivers all the sales tax that the drivers actually collected from

the passengers. Department of Revenue Regulation 560-12-2-.84(7)(b). This interpretation is further supported by the fact that Section (4) of 560-12-2-.84 clearly places responsibility on the drivers, who lease taxi cabs and deal directly with the passengers, to collect the tax on fares and pay it over to the dealer (headquarters operator) for remittance to the Revenue Commissioner.

The clear language of the regulation places responsibility for collection of sales tax on those parties who deal directly with the passengers, or who otherwise have the right or opportunity to exercise control over collection of the tax. With respect to drivers with whom Adam Cab had an independent contractor

relationship, the Court finds that Regulation 560-12-2-.84(7)(b) does not make Adam Cab liable for sales tax which the drivers failed to collect from the passengers. To the extent Appellant's motion for summary judgment sought a determination to this effect, the motion is partially granted. However, the regulation's clear requirement that headquarters operators and lessors, "shall collect the tax on fares for transportation of persons from their drivers", continues to place responsibility on Adam Cab for sales tax actually collected by the drivers from passengers, which Adam Cab thereafter fails to collect from the drivers. It is a legitimate concern of the State, that if

a company chooses to create an independent contractor relationship with its taxicab drivers, it be required to create and maintain that relationship in a manner that insures the drivers will remit to the company all the taxes they collect. To the extent Appellant's motion sought relief from this liability, the same is denied. Accordingly, questions of fact exist as to the amount of sales tax collected by the drivers from passengers; the amount of such tax collected by Adam Cab from the drivers and the amount remitted to the Revenue Commissioner. To the extent Appellant sought summary judgment on these factual issues, the same is denied. The due process arguments made in support of Appellee's motion for

partial summary judgment are addressed to an interpretation of the regulation not supported by its clear language. Therefore, Appellee's motion for partial summary judgment must be denied.

Another issue raised by the pending motions is whether the taxicab drivers are independent contractors or servant employees of Adam Cab. The chief test used to determine whether a person is engaged as a servant or an independent contractor is whether the employer has or assumes the right to control the time, manner and method of the performance of the work (servant), as distinguished from the right merely to require that a certain result be obtained (independent contractor). Slater v. Canal Wood Corp.

of Augusta, 178 Ga. App. 877, 345 S.E.2d 71 (1986). A second test is whether the alleged independent contractor has a bona fide existence apart from the employer, or functions instead as the employer's alter ego. See, Buchanan v. Canada Dry Corp., 138 G. App. 588, 226 S.E.2d 613 (1976).

The record before the Court establishes as a matter of law that the taxicab drivers at issue acted as independent contractors of Adam Cab. The affidavit of Martin Koncul, CEO of Adam Cab, states that the company leases its cabs to drivers as independent contractors; that the drivers pay all expenses of operation on the vehicles; that they doe not report their locations nor are they assigned any specific

locations in which to work; that although the drivers are requested to report the amount of fares they generate, they generally will not do so and the company has no way of determining whether or not any reports made by the drivers are accurate; that no control is asserted over any of the driver's activities. The affidavits of two taxicab drivers, who lease taxicabs from Adam Cab, indicate that they rent the cabs for $52.00 per day and the drivers pay for all maintenance, gasoline, oil, license fees and insurance; that they can drive the cab to any location and are not under the control of Adam Cab. (Affidavits of Sapp and Hendricks). The drivers also relate that passengers will seldom pay the sales tax

on fares, but that as much of the sales tax they do collect, they remit to Adam Cab. Id.

The fact that the taxicabs bore the Adam Cab logo and that Adam Cab acted as a headquarters to relay telephone calls for fares to the drivers is not sufficient to show that Adam Cab controlled the driver's activities or that the drivers acted as the company's alter ego. See, Fidelity & Casualty Co. of N.Y. v. Windham, 209 Ga. 592, 74 S.E.2d 835 (1953). To the extent Appellant sought to establish that its drivers acted as independent contractors its motion for summary judgment is granted. Slater, supra.; Also, Fidelity, supra, (for similar facts found to establish taxicab driver independent

contractor relationship).

The Court notes that some municipalities apparently have enacted ordinances, which prohibit cab companies from employing drivers as independent contractors. See, Worrell v. Yellow Cab Company, 146 Ga. App. 748, 247 S.E.2d 569 (1978), affirmed in part at 155 Ga.App. 41, 273 S.E.2d 410 (1980). Obviously, such an ordinance could alter the result in this case. However, no such ordinance has been enacted by the City of Savannah, where Adam Cab is located.

So ORDERED, this 31st day of July, 1990.

/s/
PERRY BRANNEN, JR., JUDGE
SUPERIOR COURT, EJC, GA.

cc: Daniel E. Formby
Amelia Waller Baker
Fred Clark

In the Supreme Court of Georgia

Decided: JUN 07 1991

S91A0131. COLLINS, COMMR. v. ADAM CAB, INC., d/b/a ADAM CAB CO.

BENHAM, Justice.

Pursuant to Regulation 560-12-2-.84(7)(b) of the Rules and Regulations of the Georgia Department of Revenue, appellant State Commissioner issued a tax assessment of $18,765.18 against appellee Adam Cab for failure to remit sales tax on fares for transportation for January through November 1986. We granted the Commissioner's application for discretionary review of the denial of his motion for summary judgment to determine whether the trial court correctly interpreted the revenue regulation.

Regulation 560-12-2-.84 allocates responsibility for the collection of the tax on fares for transportation of persons and the remittance thereof to the State Commissioner.[1] In 1983, Regulation 560-12-2-.84 was supplemented with the

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[1]An owner and operator of a cab collects the tax on fares and remits it to the State Commissioner; one who leases or rents a cab from another who supervises his operations collects the tax and pays it to his lessor, who remits it to the State Commissioner; one who leases a cab which is partially operated by both the lessor and lessee collects the tax and remits it to the lessor for remittance to the State Commissioner; a cab driver who operates out of a headquarters for cabs, is supervised or directed by the headquarters operator or receives relayed calls from the headquarters operators collects the tax and pays it to the headquarters operator who remits it to the State Commissioner. An "independent" taxicab driver collects the tax and remits it directly to the State Commissioner.

subparagraph at issue ((7)(b)), which states:

> "Due to the likelihood that the State would otherwise lose tax funds due to the difficulty of policing the business operations of taxicab drivers because of the nature of the business, the lack of an office or regular place of business and the turnover of drivers, headquarters operators and lessors of taxicabs shall collect the tax on fares for transportation of persons from their drivers as required above, and the term "headquarters operators" includes not only any person operating a headquarters for taxicabs and supervising or directing taxicab drivers, or receiving and relaying calls to cab driver members, but also any person or entity allowing use of the trade name of the headquarters or allowing any driver to hold himself out as being associated with the headquarters. The term "taxicab lessors" includes any person or entity leasing a vehicle to another person or entity for use as a taxicab."

The trial court found that, during the 11-month period in question, Adam's Cab leased cabs bearing the Adam Cab logo to drivers and relayed calls to the drivers, thereby qualifying as a "headquarters operator" and a "taxicab lessor" under the amended revenue regulation. It then determined that the regulation required Adam Cab to remit to the State Commissioner only that tax on fares actually collected by its independent contractor drivers from their passengers.

In so ruling, the trial court failed to take into account the statement of public policy and concerns set forth in the amended regulation. There the Department of Revenue recognized the need

to collect the tax on fares for transportation of persons; the vital role in the collection of the tax played by the taxicab driver; and the impossibility or impractibility, due to the nature of the business operations of taxicab drivers, of the State to collect the tax from the individual drivers. Because of those factors, the Department of Revenue placed the burden on the headquarters operators and taxicab lessors to collect the tax from the drivers for remittance to the State Commissioner.[2] It is clear that one

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[2]The burden so placed is similar to the burden placed by OCGA §48-8-2 (6)(G) on those who sell tangible personal property to persons for resale when there is a likelihood the State will lose tax funds due to the difficulty of policing the business operations of the retailer. Cf. Independent Publishing Co. v. Hawes,

who meets the regulatory definition of lessor or headquarters operator is in a better position to arrange with the individual drivers with whom it does business for the collection and remittance of the tax on fares than is the State, and that the regulation places that burden on the lessor or headquarters operator. Disagreeing with the trial court's interpretation of Regulation 560-12-2-.84(7)(b), we reverse its judgment insofar as it limits Adam Cab's liability to the taxes actually collected by its independent contractor drivers.[3]

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119 Ga. App. 858 (168 SE2d 904) (1969).

[3]That a driver may be an independent contractor does not mean he is an independent taxicab operator, individually

2. Our ruling in Division 1 does not require the grant of summary judgment to appellant. This case must be remanded to the trial court for consideration and resolution of the constitutional issues raised by appellee but not ruled upon by the trial court.

Judgment reversed and case remanded. All the Justices concur.

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responsible for remittance of the tax on fares to the State Commissioner, since "independent taxicab operator" is defined in the regulation as "a person totally unassociated with any headquarters operation and with any lessors of taxicabs and with any other taxicab business or driver." Reg. 560-12-2-.84(7)(a).

IN THE SUPERIOR COURTS, EASTERN JUDICIAL CIRCUIT, GEORGIA

Adam Cab, Inc., d/b/a Cab Company, Appellant,	*	CA#X89-2025-4
v.	*	
Marcus E. Collins, Sr., State Revenue Commissioner, Appellee.	*	

ORDER ON APPELLEE'S REINSTATED MOTION FOR PARTIAL SUMMARY JUDGMENT

This case involves an appeal of a tax assessment by the Georgia Department of Revenue against Adam Cab, Inc. d/b/a Adam Cab Company, for the period of January 1, 1986 through November 30, 1986. The appeal to the Superior Court of Chatham County is from a decision of the State Revenue Commissioner of May 31, 1989, in which the Revenue Commissioner assessed

taxes, interest and penalties for the period of January 1, 1986 through November 30, 1986.

The issue in this case concerns the Department of Revenue's Regulation 560-12-2-.84(7)(b) affect on Adam Cab's responsibility to collect and remit sales tax on taxifares generated by the drivers who lease the taxicabs from Adam Cab Company. The section of the Regulation at issues provides:

> "(b) Due to the likelihood that the State would otherwise lose tax funds due to the difficulty of policing the business operations of taxicab drivers because of the nature of the business, the lack of an office or regular place of business, and the turnover of drivers, headquarters operators and lessors of taxicabs shall collect the tax on fares for transportation of persons from

> their drivers as required above, and the term 'headquarters operations' includes not only any person operating a headquarters for taxicabs and supervising or directing taxicab drivers, or receiving and relaying calls to cab driver members, but also any person or entity allowing use of the trade name of the headquarters or allowing any driver to hold himself out as being associated with the headquarters. The term 'taxicab lessors' includes any person or entity for use as a taxicab. Department of Revenue Regulation 560-12-2-.84(7)(b)."

This Court in its original consideration of the appellee's Motion for Partial Summary Judgment and the appellant's Motion for Summary Judgment denied the appellee's Motion for a Partial Summary Judgment and granted in part the appellant's Motion for Summary Judgment. In this Court's Order dated August 2,

1990, the Court held that 560-12-2-.84(7)(b) placed the responsibility of collecting the taxes on the drivers who leased the cabs and who dealt directly with the passengers. The drivers were then to pay the tax collected to the cab company who would then remit the taxes to the Revenue Commissioner. In accordance with this interpretation of the Regulation the Court held that Adam Cab was only responsible for the taxes which were actually collected by the drivers.

This Order was appealed to the Supreme Court and on June 7, 1991 the Supreme Court reversed and remanded the decision to the Superior Court of Chatham County. The Supreme Court based its interpretation of the Regulation on the

Department of Revenue's statement of public policy as set forth in the amended Regulation. This public policy statements articulates the importance of collecting taxes on transportation fares, the vital role taxicab drivers play in the collection of the taxes, and the anticipated difficulties involved in the State's collecting the taxes directly from the drivers. The Supreme Court reversed the ruling of the Superior Court of Chatham County concerning the limitation upon the liability of Adam Cab. The Court then remanded the case back to the Superior Court of Chatham for a decision on the constitutional issues.

The appellee has now moved this Court to reinstate its Motion for Partial

Summary Judgment. During a hearing on this reinstatement of the Motion all parties agreed that the constitutional issue had been fully briefed and that they would stand by the briefs previously submitted to this Court. The decision of the Court today focuses solely on the constitutional issues of this case, as raised by the parties in their respective briefs.

The appellant, in its Motion for Summary Judgment failed to raise any constitutional challenge to the Department of Revenue's regulation. However, the appellee in its reinstated Motion for Partial Summary Judgment argued that the Regulation as applied in this case was constitutional. The appellee argued that

the Regulation was reasonably regulated to legitimate State interest. Adam Cab, in response to appellee's Motion, argued that Frankel v. Cone, 214 Ga. 733 (1959) was controlling and that the Court must find the Regulation unconstitutional.

The standard generally accepted for determining constitutionality under the Due Process clause when reviewing tax regulations is the rational relationship test. Under this analysis the regulation is presumed valid as long as it bears a rational or reasonable relationship to a legitimate governmental purpose. Adam Cab, as the party challenging the constitutionality of the Regulation, failed to overcome this presumption. Although this Court finds that Frankel,

supra, raises interesting issues, this Court, without further guidance from the higher courts of this State, is not in a position to apply Frankel, supra, to taxes. Therefore, this Court must hold the Regulation as written constitutional. The appellee's reinstated Motion for Partial Summary Judgment is GRANTED, only as to the constitutionality of the Regulation.

SO ORDERED THIS 29TH DAY OF OCTOBER, 1991.

/s/
PERRY BRANNEN, JR. JUDGE
SUPERIOR COURTS, EJC, GA.

Copies to:

Fred S. Clark, Esq.
Daniel Formby, Esq.

Case No. S92D0276

SUPREME COURT OF GEORGIA

ATLANTA DEC 18, 1991

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

ADAM CAB, INC., d/b/a ADAM CAB COMPANY V. MARCUS E. COLLINS, COMR.

From the SUPERIOR COURT OF CHATHAM COUNTY.

Upon consideration of this Application for Discretionary Appeal, it is ordered that it is hereby denied.

All the Justices concur, except Clarke, C. J., Smith, P. J., and Bell, J., who dissent.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes, of the Supreme Court of Georgia. Witness my signature and the seal of said Court affixed the day and year last above written.

/S/ Lynn M. Stinchcomb, Deputy Clerk

SUPREME COURT OF GEORGIA

ATLANTA JANUARY 08, 1992

Case No. S92D0276

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

ADAM CAB, INC., d/b/a ADAM CAB COMPANY V. MARCUS E. COLLINS, COMR.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

Clarke, C. J., Weltner, P. J., Bell, J., Hunt and Fletcher, JJ., who concur. Benham, J., who dissents.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia. Witness my signature and the seal of said court affixed the day and year last above written.

/S/ Joline B. Williams, Clerk

Case No. S92D0276

SUPREME COURT OF GEORGIA

ATLANTA January 15, 1992

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

ADAM CAB, INC., d/b/a ADAM CAB COMPANY V. MARCUS E. COLLINS, COMR.

It is ordered that this Court's order of January 8, 1992, be amended to show Benham, Jr., concurring rather than dissenting and Bell, J., dissenting rather than concurring.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is

a true extract from the minutes

of the Supreme Court of Georgia.

Witness my signature and the seal of said Court hereto affixed the day and year last above written.

/S/ Lynn M. Stinchcomb, Deputy Clerk

STATE OF GEORGIA

CHATHAM COUNTY

PERSONALLY APPEARED before the undersigned officer duly authorized to administer oaths, ROGER F. HENDRICKES, who on oath taken deposes and swears as follows:

I am a tax cab driver by profession, driving Adam Cab Company vehicles. I rent my taxi cab from Adam Cab Company paying $52 per day. I pay for all maintenance, gasoline, oil, license fees and insurance. When I drive away from Adam Cab Company I can go any place that I want with the taxi cab. I am not under the control of Adam Cab Company.

I do not have to drive for Adam Cab Company. I can rent from another cab company.

I have very seldom been able to get a customer to pay the sales tax on the fare. Whenever I ask I am told to take the sales tax out of the tip.

I turn in as much of the sales tax as I collect to Adam Cab Company because I do not know what else to do with it.

I understand that this affidavit is given in the appeal of Adam Cab Company of the assessment for uncollected sales tax on fares.

This 10th day of February, 1990.

LUTHER HANCOCK
Notary Public,
Chatham County, Ga.
My commission expires
April 2, 1991

/s/
Roger F. Hendrickes

Sworn to and subscribed
before me this 10th day
of February, 1990.

/s/Luther Hancock
NOTARY PUBLIC, CHATHAM
COUNTY, GEORGIA

STATE OF GEORGIA

CHATHAM COUNTY

PERSONALLY APPEARED before the undersigned officer duly authorized to administer oaths, JOHN SAPP, who on oath taken deposes and swears as follows:

I am a tax cab driver by profession, driving Adam Cab Company vehicles. I rent my taxi cab from Adam Cab Company paying $52 per day. I pay for all maintenance, gasoline, oil, license fees and insurance. When I drive away from Adam Cab Company I can go any place that I want with the taxi cab. I am not under the control of Adam Cab Company.

I do not have to drive for Adam Cab Company. I can rent from another cab company.

I have very seldom been able to get a customer to pay the sales tax on the fare. Whenever I ask I am told to take the sales tax out of the tip.

I turn in as much of the sales tax as I collect to Adam Cab Company because I do not know what else to do with it.

I understand that this affidavit is given in the appeal of Adam Cab Company of the assessment for uncollected sales tax on fares.

This 10th day of February, 1990.

/s/
JOHN SAPP

Sworn to and subscribed
before me this 10th day
of February, 1990.

/s/Luther Hancock
NOTARY PUBLIC, CHATHAM
COUNTY, GEORGIA

LUTHER HANCOCK
Notary Public,
Chatham County, Ga.
My commission
expires April 2,
1991

IN THE SUPERIOR COURT OF CHATHAM COUNTY

ADAM CAB, INC. d/b/a ADAM CAB COMPANY, Appellant	*	
VS.	*	CIVIL ACTION X89-02026-4
MARCUS E. COLLINS, SR., STATE REVENUE COMMISSIONER, Appellee	*	

BRIEF OF APPELLANT

Statement of Facts

The Georgia Department of Revenue has assessed Adam Cab Company for uncollected sales taxes that were to be collected from passengers by the drivers. Every driver is an independent contractor who leases a taxi cab from the Appellant. The cabdriver collects the fares but is not obligated to report the fares to the company as a matter of company policy.

The driver may report the fares collected and may pay over sales tax. However, if the driver does this, it is essentially voluntary since the company has no means by which to insure that the proper taxes are collected and paid or that the correct amount of the fares are reported.

The Revenue Department made no audit of Appellant's financial records nor the records of the taxi cab drivers. Nevertheless, the Revenue Department's assessment is based on a calculation bureaucratically made with no relationship to the actual experience of the drivers.

Argument of Law

The Revenue Department alleges that the cab company failed to collect and remit sales tax for fares received by the

lessees of its cabs as required under Ga. Comp. Rules and Regulations, 560-12-2.84(2)(3)(7b) 1983. However, the drivers are independent contractors who lease the vehicles, do not report or pay any portion of the fares they receive to the company. They pay all expenses of the operation of the vehicles. The regulations require independent taxi cab drivers to pay the sales tax on their fares directly to the Revenue Department. Ga. Com. Rules and Regulations, 560-12-2-.84(5).

These regulations provide:

560-12-2-.84 Taxicabs. Amended.

"(2) . . . Additionally, lessees or rentees of taxicabs shall collect the tax on fares

for transportation of persons in accordance with the uniform bracket system. Said lessees or rentees shall pay the tax on charges for the lease or rental of tangible personal property and fares collected for transportation of persons to their lessors or renters and said lessors or renters shall remit same to the State Revenue Commissioner.

(3) Taxicab operators and lessors. Any person owing and leasing taxicabs which are operated partially by the owner and partially by the lessee shall register as a dealer and

pay the tax at the time of purchase on tangible personal property used or consumed in the operations, including taxicabs, meters, accessories, tires, repair parts, gasoline, lubricants, and other supplies. Additionally, such lessors shall collect the tax on the gross lease or rental charges for taxicabs and equipment, and shall collect the tax on any tangible personal property sold to lessees. Lessees shall collect the tax on fares for transportation of persons in accordance with the uniform bracket system and pay such tax

to the lessor for remittance to the State Revenue Commissioner.

(5) Independent taxicab operators. Independent taxicab operators shall register as dealers and pay the tax at the time of purchase, lease or rental on all equipment, materials, and supplies used or consumed in the operations. Additionally, such persons shall collect the tax on fares for transportation of persons in accordance with the uniform bracket system and remit same to the State Revenue Commissioner.

(7) Definitions.

. . .

(b) Due to the likelihood that the State would otherwise lose tax funds due to the difficulty of policing the business operations of taxicab drivers because of the nature of the business, the lack of an office or regular place of business and the turnover of drivers, headquarters operators and lessors of taxicabs shall collect the tax on fares for transportation of persons from their drivers as required above, and the term "headquarters operators" includes not only any person

operating a headquarters for taxicabs and supervision or directing taxicab drivers, or receiving and relaying calls to cab driver members, but also any person or entity allowing use of the trade name of the headquarters or allowing any driver to hold himself out as being associated with the headquarters. The term "taxicab lessors" includes any person or entity leasing a vehicle to another person or entity for use as a taxicab. G.C.R. & R. r. 560-12-2-.84 (2), (3), 5, (7)(b)."

The issue involves the relationship between the owners and drivers and the legal obligations each has to the other. That is, if the drivers are employees the cab company would have control over the drivers. Thus, they could effectively require the drivers to report the fares and pay the tax. Without such control, they have no control over the drivers.

There are no Georgia cases in point. However, in a Minnesota case a distinction was made between employees and independent contractors. Corbin v. Commissioner, 307 Minn. 237, 240 N.W.2d 809 (1976). That Court held that a distinction between employees and independent contractors is critical because where an employee makes the sale

the sale is attributed to the employer. However, where the sale is made by an independent contractor, it is his own sale and he alone is responsible for collecting and remitting the sales tax. Corbin v. Commissioner, 307 Minn. 237, 240 N.W.2d 809, 812 (1976). That Court held in another case that a party does not have the duty to collect sales tax unless that party has adequate control over the payments in question and an adequate opportunity to set aside the sales tax from such payments. Fridlund Securities Co. v. Minnesota Commissioner of Revenue, _____ Minn. _____, 430 N.W.2d 154. A similar distinction should be made in the instant case and can readily be applied based on the Georgia statutes. OCGA

48-8-1 contained a statement by the legislature of its intention to tax services. In the case of a cab company with independent drivers the drivers are providing the service and not the company.

Similarly, in Wyoming the appellate court in that state ruled that if cab drivers are independent contractors they must contribute to the State Unemployment Compensation Fund. The determination was made there based on certain factual situations that would certainly be applicable in this case which are as follows:

> "(1) Control exercised by cab company over its drivers as evidenced by the presence or absence of rate schedules, the

ability of either party to terminate the agreement at any time, et cetera;

(2) Freedom of drivers under their lease agreement to perform their duties as they see fit;

(3) Whether the 'essence' of the cab company's business is conducted in the cab between a customer's origin and destination, or in the company's office;

(4) Whether the state and local cab permits are held by the driver or the company;

(5) The extent of materials furnished by the cab company,

such as gas, oil, liability insurance, license fees, capital for the driver to purchase the cab, and other miscellaneous equipment;

(6) Which party bears the risks of the relationship, i.e., is the driver dependent on the cab company to earn his livelihood;

(7) The leasing agreement itself."

Employment Security Commission of Wyoming v. Laramie Cabs., Inc., 700 P.2d 399, 405-09 (Wyo. 1985)

The regulations seem to indicate that the Georgia Revenue Department considers independent taxicab operators to be

treated separately from employee operators. These regulations define independent taxicab operators separately. They are by regulation required to register as dealers and pay the tax at the time of purchase, lease or rental on all equipment, materials and supplies used or consumed in the operations. The regulations state further, " . . such persons shall collect the tax on fares for transportation of persons in accordance with the uniform bracket system and remit same to the State Revenue Commissioner". G.C.R.&R. r. 560-12-2-.84(5).. Further, the definitions state at 7a, "The term 'independent taxicab operator' means a person who is totally unassociated with any headquarters

operation and with any lessors of taxicabs and with any other taxicab business or driver." Reading this in association with the provisions of OCGA 48-8-1 setting the legislators intent to tax services, a cab company which has no control over the activities of the lessees do not render the taxable services in question, meaning the rides, and therefore should not be responsible for collecting and remitting sales tax on services they do not render. Thus, it would be inconsistent to hold taxicab lessors liable for collecting the tax where they have rendered no taxable service.

Likewise, a Florida court held that in a lessor-lessee relationship a statute which designates the lessor as an agent

for collecting and remitting taxes to the state revenue department must be read as meaning that the lessee must pay the tax. Noriega v. Schnurmacher Holding, Inc., 528 So. 2d 28, 30 (Fla. 3d DCA 1988). Georgia law provides a similar provision in that the dealer is required to collect a tax imposed from the purchaser or consumer and the dealer is to pay the tax over to the revenue commissioner. OCGA 48-8-33. This provides, "Notstanding any exemption from taxes which a dealer enjoys under the Constitution or laws of this state, any other state, or the United States, the dealer shall collect the tax imposed by this article from the purchaser or consumer and shall pay the tax over to the commissioner as provided by law."

This confirms that a lessor who merely acts as an agent for the state in collecting sales tax is not intended to be the party who is liable for paying it. It is the driver-lessee who should be held liable for the deficiency in this case.

An Alabama case if applied in the instant situation, puts the Revenue Commissioner's decision to assess the taxicab company in a most unfavorable light. In the case of Alabama v. Advertiser Company, 337 So. 2d. 942, 947 (Ala. 1976), the court interpreted an attempt by the Alabama legislature to have the collection of sales tax from the actual newspaper sellers by the newspaper itself. It stated that the regulation, ". . . is nothing more or less than the

department's unilateral decision to refuse to collect the tax from the individuals on whom the statute places it. . . ., it is not proper for the department to make up the lost revenue by proceeding against a party whose liability arises only because of the unilateral refusal." State of Alabama v. Advertiser Company, 337 So. 2d. 942, 947 (Ala. 1976) A similar attempt is being made by the Commissioner in the instant case and should not be allowed.

Conclusion

For all of the foregoing reasons, it is respectfully submitted that the assessment against the taxicab companies

was improper and the regulation should be deemed invalid and the assessment relieved.

CLARK AND CLARK

BY_____
FRED S. CLARK
Attorney for Appellant
State Bar No. 126800

P. O. Box 8151
Savannah, Georgia 31412
912-233-0300

IN THE SUPERIOR COURT OF CHATHAM COUNTY
STATE OF GEORGIA

ADAM CAB, INC. d/b/a ADAM CAB COMPANY, Appellant	*	
VS.	*	CIVIL ACTION X89-02026-4
MARCUS E. COLLINS, SR., STATE REVENUE COMMISSIONER, Appellee	*	

BRIEF IN SUPPORT OF APPELLEE'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO APPELLANT'S MOTION FOR SUMMARY JUDGMENT

This case involves the appeal of a tax assessment issued by the Georgia Department of Revenue (hereinafter "the Department") against Adam Cab Company (hereinafter "Adam Cab") for failure to remit sales tax to the Georgia Department of Revenue for the period January 1, 1986 through November 30, 1986. In this

appeal, Adam Cab has challenged the constitutionality of the regulation under which the Department has issued the tax assessment as well as the amount of the assessment. The Department moves here for partial summary judgment as to the constitutionality of Department of Revenue Regulation 560-12-2.84(7)(b) and its application to Adam Cab.[1] As will be demonstrated below, the regulation challenged by Adam Cab is constitutional

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[1]The Department has moved for partial summary judgment because even if it prevails as to the validity of the regulation there may still be a dispute as to the amount of the assessment against Adam Cab. Adam Cab has moved for summary judgment because if it prevails as to its challenge to the validity of the regulation, there will be no other issue to be decided.

as is its application to Adam Cab and the Department is entitled to judgment in its favor as a matter of law.

STATEMENT OF FACTS

Adam Cab has brought this appeal challenging an assessment issued against it by the Department for delinquent sales tax for the period January 1, 1986 through November 30, 1986.

Adam Cab is in the business of leasing taxicabs and operating a headquarters for taxicabs. All of the taxicabs which Adam Cab leases or which use Adam Cab as a headquarters bear Adam Cab's logo. Affidavit of Alver B. Claxton. During the period of January 1, 1986 through November 30, 1986, Adam Cab, acting as a lessor of taxicabs and as a

headquarters, did not collect or remit to the Department any sales tax on fares for transportation generated by taxicab drivers leasing cabs from it or using it as a headquarters. Appellant's Answer to Appellee's Interrogatory No. 12. During this same period of time, Adam Cab did not maintain any records regarding fares paid for transportation generated by taxicabs which it either leased or for which it acted as a headquarters. Appellant's Answer to Appellee's Interrogatory No. 5.

In March and April of 1989, the Department audited Adam Cab. The audit indicated that Adam Cab had failed to collect and remit any sales tax to the Department for the period January 1, 1986 through November 30, 1986. Because Adam

Cab did not provide the Department with any records from which its fare tax liability could be directly determined, the Department determined Adam Cab's fare tax liability by using documented fares of another cab company in Chatham County. Affidavit of Alver B. Claxton.

Pursuant to Department of Revenue Regulation No. 560-12-2.84(7)(b) (attached hereto as Exhibit "A"), which regulation became effective on March 20, 1983, the Department assessed Adam Cab as a taxicab lessor and headquarters operator for delinquent sales tax in the amount of $18,765.18. By petition dated May 25, 1988, Adam Cab petitioned the Department for a redetermination of tax liability on the ground that the assessment against

Adam Cab constituted an unconstitutional deprivation of property without due process. After consideration of the petition, the Department issued a final determination of liability in the amount of $18,765.18, finding no basis for adjusting the tax liability of its preliminary assessment. It is from this official notice of assessment and demand for payment that Adam Cab has appealed.

ARGUMENT AND CITATION OF AUTHORITIES

I. Adam Cab Is Required By Law To Collect And Remit To The Department Sales Tax On Fares For Transportation.

Regulation 560-12-2.84 requires any person leasing taxicabs to others or operating as a headquarters for taxicab drivers to register as a dealer with the

Department for purposes of collecting and remitting sales tax. Regulation 560-12-2.84 also specifically requires lessors and headquarters operators to collect and remit sales tax on fares collected for transportation of persons to the State Revenue Commissioner.

Although this regulation has always placed the burden of collecting and remitting sales tax on fares for transportation upon the taxicab lessor and headquarters operator, the regulation was amended in 1983 to further clarify the role of the lessor and headquarters operator as agents of the State in the collection and remittance of sales tax. Paragraph 7 of the regulation, added in 1983, provides as follows:

"Due to the likelihood that the State would otherwise lose tax funds due to the difficulty of policing the business operations of taxicab drivers because of the nature of the business, the lack of an office or regular place of business and the turnover of drivers, headquarters operators and lessors of taxicabs shall collect the tax on fares for transportation of persons from their drivers as required above, and the term 'headquarters operators' includes not only any person operating a headquarters for taxicabs and supervising or directing taxicab drivers, or receiving or relaying calls to cab driver members, but also any person or entity allowing use of the trade name of the headquarters or allowing any driver to hold himself out as being associated with the headquarters. The term 'taxicab lessors' includes any person or entity leasing a vehicle to another person or entity for use as a taxicab."

Revenue Regulation 560-12-2.84(7)(b) (emphasis added). Because Adam Cab is a

"taxicab lessor" as well as a "headquarters operator," it is required to collect sales tax from its drivers.

II. Regulation 560-12-2.84, As Applied In This Case, Does Not Deprive Adam Cab Of Due Process Of Law Or Of Equal Protection Under The Law.

There is absolutely no merit to Adam Cab's constitutional challenge to Regulation 560-12-2.84(7)(b) or its application in this case. In its appeal, Adam Cab argues that the imposition upon it of the requirement of collecting sales tax from its lessees deprives it of property without due process. In its motion for summary judgment and supporting brief, however, Adam Cab does not elaborate at all on its constitutional argument and, in fact, does not set forth

a single argument or case in support of its constitutional challenge to the Regulation.

Adam Cab has set forth no support for its constitutional challenge because there is none. Indeed, a review of the relevant case law reveals that the regulation at issue clearly complies with both procedural and substantive due process requirements. With respect to procedural due process, it is well established that the notice of the assessment of the Commissioner issued to Adam Cab and the right to appeal to this Court provides for sufficient procedural due process. Richards v. Blackmon, 233 Ga. 739, 213 S.E.2d 638 (1975); Buice v. Dickson, 223 Ga. 645, 157 S.E.2d 481 (1967).

With respect to substantive due process, Georgia case law as well as federal case law indicate that the test of constitutionality is "'whether the method of regulation embodied in the statute bears a reasonable relation to a constitutionally permissible object.'" State v. Major, 243 Ga. 255, 257, 253 S.E.2d 724 (1979) (citations omitted); Anderson v. Little & Davenport Funeral Home, Inc., 242 Ga. 751, 251 S.E.2d 250 (1978).[2] In other words, the standard is

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[2]This same test is used in the context of an equal protection challenge. It appears from the Appeal that Adam Cab may also be challenging the Regulation on equal protection grounds. For the reasons set forth above, its equal protection challenge, like its due process challenge, its without merit.

one of "reasonable relationship." Applying this standard to the regulation at issue, it is clear that the regulation is valid.

The objection of Regulation 560-2-2.84(7)(b) as well as of Georgia's sales tax laws is to ensure the collection and remittance of sales tax to the State -- clearly a legitimate State interest. See International Harvester Co. v. Wisconsin Dept. of Taxation, 322 U.S. 435 (1944) (power to tax and to collect taxes is included in states' inherent power of taxation). Regulation 560-2-2.84(7)(b) seeks to achieve this legitimate objective in an industry difficult to monitor by imposing the burden of collecting and remitting sales tax on those persons who

lease taxicabs to drivers or operate a headquarters for taxicab drivers. Given that lessors of taxicabs and headquarters operators, such as Adam Cab, have daily contact with and supervision over taxicab drivers, it is certainly reasonable for them to be required to collect and remit sales tax to the State. See International Harvester Co. v. Wisconsin Dept. of Transportation, 322 U.S. at 443-44 ("some practically effective devise [is] necessary in order to enable the state to collect its tax); Wells v. Malloy, 402 F.Supp. 856 (D. Ver. 1975), aff'd, 538 F.2d 317 (2d Cir. 1976) (state tax collection procedure need only be fair and reasonable).

It is also important to note that the Georgia Supreme Court upheld a similar law in the case of Richards v. Blackmon, 233 Ga. 739, 213 S.E.2d 638 (1975). In Richards v. Blackmon, a taxpayer challenged on due process and equal protection grounds a Georgia statute making a purchaser of a business personally liable for sales tax unpaid by the former owner. The taxpayer argued that the statute was unconstitutional because it sought to impose liability and judgment on it based upon a mere relationship or association without a justifiable connection between the seller and purchaser of the business. The Georgia Supreme Court, however, found that there was no merit to the taxpayer's

constitutional challenge to the statute and in so doing observed that the taxpayer could have prevented its personal liability by withholding a sufficient part of the purchase money to cover unpaid taxes as provided for in the challenged statute. Id. at 741.

Similarly, in this case, Adam Cab is presumed to have known the requirement of the sales tax regulation. Adam Cab, like the taxpayer in Richards v. Blackmon, could have prevented its liability by collecting sales tax from its taxicab drivers and remitting it to the State as required by regulation. Contrary to Adam Cab's argument, there is absolutely no reason why Adam Cab could not have collected sales tax from its drivers. As

the lessor of the taxicab vehicles and as a headquarters operator for the drivers, Adam Cab Company was certainly in a position to require its taxicab drivers to report fares collected on a daily basis. Furthermore, in setting the rental rates for its cabs as well as fees for using the headquarters, Adam Cab presumably had some reasonable idea as to the amount of fares being collected by its drivers. In other words, Adam Cab was in a position to know approximately how much sales tax should be remitted by its drivers. If the taxicab drivers failed or refused to collect and remit sales tax to Adam Cab, Adam Cab could have simply terminated its relationship with the drivers.

Given the Regulation is reasonably related to a legitimate State objective and that Adam Cab has failed to demonstrate that the Regulation lacks a reasonable basis, the Regulation must be upheld. See Anderson v. Little & Davenport Funeral Home,Inc., 242 Ga. 751, 242 Ga. 751 (1978) (one who assails constitutionality of law on equal protection and due process grounds must carry the burden of showing that it does not rest on any reasonable basis).

III. Regulation 560-12-2.84(7)(b) Imposes Responsibility of Collecting and Remitting Sales Tax on Adam Cab Whether Its Drivers are Employees or Independent Contractors.

Regulation 560-12-2-.84 clearly imposes the duty upon Adam Cab as a lessor and as a headquarters operator to collect

and remit sales tax to the State. Adam Cab cannot be relieved of this responsibility because it failed to collect the taxes from its lessees. See Davis v. Chilivis, 142 Ga. App. 679, 237 S.E.2d 2 (1977) (dealer is liable for sales tax whether he collects the tax or not). Neither can Adam Cab be relieved of its responsibility because, as it argues throughout its brief, the taxicab drivers may be deemed to be independent contractors. The regulation clearly does not relieve a lessor or headquarters operator of its collection and remittance responsibility where its drivers may be considered independent contractors. Regulation 560-12-2.84(7)(b). The concept of independent contractor versus employee

is simply not relevant under the regulation. Furthermore, the United States Supreme Court has indicated that the label of "independent contractor" is not controlling in determining the constitutionality of a state's power to collect taxes from certain entities. Scripto v. Carson, 362 U.S. 207 (1960) (the fact that salesmen working in tax state are designated as "independent contractors" by foreign corporation is not controlling in determining if tax on corporation is constitutional).

Moreover, none of the cases cited in Adam Cab's brief directly or indirectly support its proposition that the State cannot require cab companies to collect sales tax from independent contractor

drivers. Indeed, all of the cases cited by Adam Cab are from other jurisdictions and involve interpretations of state statutes completely different from the regulation at issue. See, e.g., Noriega v. Schnurmacher Holding, Inc., 528 So.2d 28 (Fla. App. 1988) (court interpreted Florida statute expressly making tenant responsible for sales tax on a lease); Fridland Securities Co. v. Minnesota Commissioner of Revenue, 430 N.W.2d 154 (Minn. 1988) (issue before court was whether broker's precious metal transactions were "sales"); Corbin v. Commissioner of Revenue, 307 Minn. 237, 240 N.W.2d 809 (Minn. 1976) (court interpreted Minnesota sales tax statute

which did not specify which entities were responsible for collecting sales tax).

For example, in Employment Security Commission of Wyoming v. Laramie Cabs, Inc., 700 P.2d 399 (Wyo. 1985), the sole issue before Wyoming Supreme Court was whether an "employment" situation existed between taxicab drivers and a taxi company for purposes of Wyoming's employment security laws. Although the holding in Laramie Cabs has no bearing on this case, the Wyoming court did note that general rules concerning the master/servant relationship and the independent contractor concept are not determinative of a worker's status under the employment security law. 700 P.2d at 399. Similarly, these concepts are not

determinative of Adam Cab's liability under the Department's regulation at issue in this case. Moreover, the court in Laramie Cabs noted that taxicab drivers who lease cabs from cab companies are not engaged in independent trades, occupations, professions or businesses. 700 P.2d at 408.

The only constitutional case cited by Adam Cab also fails to support Adam Cab's challenge of Revenue Regulation 560-12-2.84. In State v. The Advertiser Co., 337 So.2d 942 (Ala. App. 1976), the issue before the court was whether a publisher of a newspaper, as opposed to its independent carriers, was liable for a municipal business license tax on retail sales, which tax paralleled the state

sales tax. In analyzing the case before it, the Alabama court noted that with respect to the state sales tax, the State of Alabama and the publisher had entered into an agreement whereby the publisher would directly return sales tax on sales made to its carriers to the state rather than require the state to tax the independent carriers. According to the court, this course of dealing -- like the regulation at issue -- was developed to avoid the inconvenience for the state of collecting the tax directly from the carriers. The court noted no infirmities -- constitutional or otherwise -- with this arrangement. 337 So.2d at 944.

CONCLUSION

Adam Cab has failed to articulate any valid reason why Regulation 560-12-2.84 should not be applied to it and why it should not be responsible for remitting sales tax on fares for transportation generated by its lessees. The regulation is constitutional as is its application to Adam Cab in this case. The Department respectfully requests, therefore, that this Court enter partial summary judgment in its favor as to the constitutionality

of Regulation 560-12-2-.84 and its application to Adam Cab in this case.

Respectfully submitted,

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IN THE SUPERIOR COURT OF CHATHAM COUNTY

ADAM CAB, INC. d/b/a ADAM CAB COMPANY, Appellant	*	
VS.	*	CIVIL ACTION X89-02026-4
MARCUS E. COLLINS, SR., STATE REVENUE COMMISSIONER, Appellee	*	

APPELLANT'S SUPPLEMENTAL BRIEF AND REPLY BRIEF TO APPELLEE'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Appellant avers that the regulations are unconstitutional because they hold a party liable for the improper conduct of another. They, therefore, are in violation of the due process clauses of the United States and Georgia Constitutions.

The Georgia Supreme Court has stated that legislation that has the same effect

is unconstitutional. Frankel v. Cone, 214 Ga. 733. The statute in question in the cited case made the owner of a motor vehicle liable if the vehicle was used for the prosecution of the business of or for the benefit of such owner even though operated without the owner's knowledge or consent express or implied. Former Ga. Code Ann., §68-301. The court stated, "In our opinion, the act clearly violates the due process clause of both the Federal and State Constitutions for the reason that it makes the owner of a motor vehicle liable if the vehicle is being used in the prosecution of or for the benefit of such owner, even though operated without notice to her or without her knowledge or without her consent express or implied. To hold

this statute constitutional, would be to hold a party liable for the negligent conduct of another, even though a trespasser was operating the vehicle against the express orders of the owner, and irrepective of how careful or free from negligence the owner was, the only condition being that it be operated for the benefit of the owner." Frankel v. Cone, id. at Page 736.

In the instant case the facts show that the taxicab company owner has no direct relationship with the operator except as lessor. The owner has no control over the operation of the individual taxicab or its driver. Nevertheless, the State through its regulations is attempting to hold the

taxicab owners responsible for the driver's collecting of sales tax which is beyond their control. For these reasons it is submitted that the regulations are unconstitutional and the Appellant's Motion for Summary Judgment should be granted.

CLARK AND CLARK

By /s/ Fred S. Clark
ATTORNEYS FOR APPELLANT

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Savannah, Georgia 21412

IN THE SUPERIOR COURT OF CHATHAM COUNTY

STATE OF GEORGIA

ADAM CAB, INC. d/b/a ADAM CAB COMPANY, Appellant	*	
VS.	*	CIVIL ACTION X89-02026-B
MARCUS E. COLLINS, SR., STATE REVENUE COMMISSIONER, Appellee	*	

APPELLEE'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Section 56 of the Official Code of Georgia Annotated, O.C.G.A. §9-11-56, Marcus E. Collins, Sr., as State Revenue Commissioner, Appellee in this action, hereby moves the Court to enter partial summary judgment as to the constitutionality of Department of Revenue Regulation 560-12-2.84(7)(b) and its application to the Appellant on the

grounds that there is no genuine issue as to any material fact and the Appellee is entitled to judgment as a matter of law.

This motion is based upon all pleadings and filings in this action and the accompanying "Statement of Material Facts as to Which There is no Genuine Issue to be Tried," "Affidavit of Alver B. Claxton" and "Brief in Support of Appellee's Motion for Partial Summary Judgment and in Opposition to Appellant's Motion for Summary Judgment."

This 24th day of May, 1990.

Respectfully submitted,

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STATE OF GEORGIA

CHATHAM COUNTY

PERSONALLY APPEARED before the undersigned officer duly authorized to administer oaths, MARTIN J. KONCUL, who on oath taken deposes that he is President and principal stockholder of ADAM CAB COMPANY, INC. d/b/a ADAM CAB COMPANY and as such is familiar with the facts and circumstances involving the corporation, the operation of the business and the claim for sales tax made by the State of Georgia.

In response to the Statement of Facts the deponent states that either Adam Cab Company, Inc. d/b/a Adam Cab Company owns the taxicabs or there are some owner-operators. There are no cabs that are

jointly owned by Adam Cab Company, Inc. d/b/a Adam Cab Company and the drivers of the cabs.

Deponent states further that Adam Cab Company, Inc. d/b/a Adam Cab Company collected sales taxes on fares when they were turned in and remitted them and maintained records. These records were provided to the agent. This collection, remission and maintenance of records was done to the best ability of Adam Cab Company, Inc. d/b/a Adam Cab Company.

The records were provided to the agent, Mr. Claxton, who saw them and threw them into a box which is in the office of Adam Cab Company, Inc.

Deponent states further that in his opinion as an operator of a taxi-cab

company if he had terminated a relationship with the drivers for their failure to pay or collect the taxes he would have ultimately lost all of his drivers and been out of business.

This affidavit is given in response to Appellee's Motion for Partial Summary Judgment in the case entitled "Adam Cab., Inc. d/b/a Adam Cab Company v. Marcus E. Collins, Sr., State Revenue Commissioner," Civil Action No. X89-02026-B, Superior Court, Chatham County, Georgia.

This ____ day of June, 1990.

_____
MARTIN J. KONCUL

Sworn to and subscribed
before me this _____ day
of June, 1990.

_____
NOTARY PUBLIC, CHATHAM
COUNTY, GEORGIA

Supreme Court, U.S.
FILED
MAR 6 1992
OFFICE OF THE CLERK

No. 91-1317

In The

Supreme Court of the United States

October Term, 1991

ADAM CAB, INC. d/b/a ADAM CAB COMPANY,

Petitioner,

v.

MARCUS E. COLLINS, SR.,
STATE REVENUE COMMISSIONER,
STATE OF GEORGIA,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Georgia

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTION PRESENTED

Should this Court grant certiorari to consider the constitutionality of a state regulation that meets both procedural and substantive due process requirements?

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No. 91-1317

In The

Supreme Court of the United States

October Term, 1991

ADAM CAB, INC. d/b/a ADAM CAB COMPANY,

Petitioner,

v.

MARCUS E. COLLINS, SR.,
STATE REVENUE COMMISSIONER,
STATE OF GEORGIA,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Georgia

BRIEF IN OPPOSITION FOR THE RESPONDENT

Respondent in the above-styled action respectfully opposes the Petition for Writ of Certiorari to the Supreme Court of Georgia. None of the considerations justifying review on certiorari are met in this case. Accordingly, Respondent requests that the Petition be denied.

CITATION TO OPINION BELOW

The Order of the Superior Court of Chatham County, State of Georgia is not officially reported, but it is

reprinted in Petitioner's Appendix to Petition for Writ of Certiorari (See Petitioner's Appendix C). The Georgia Supreme Court's denial of Application for Discretionary Review is not officially reported, but it is reprinted in Petitioner's Appendix to Petition for Writ of Certiorari. (See Petitioner's Appendix D).

REGULATORY PROVISION AT ISSUE

Georgia Department of Revenue Regulation 560-12-2-.84(7)(b):

> Due to the likelihood that the State would otherwise lose tax funds due to the difficulty of policing the business operations of taxicab drivers because of the nature of the business, the lack of an office or regular place of business and the turnover of the drivers, headquarters operators and lessors of taxicabs shall collect the tax on fares for transportation of persons from their drivers as required above, and the term "headquarters operators" includes not only any person operating a headquarters for taxicabs and supervising or directing taxicab drivers, or receiving or relaying calls to cab driver members, but also any person or entity allowing use of the trade name of the headquarters or allowing any driver to hold himself out as being associated with the headquarters. The term "taxicab lessors" includes any person or entity leasing a vehicle to another person or entity for use as a taxicab.

STATEMENT OF JURISDICTION

This Court has adopted rules of guidance for determining whether a petition for writ of certiorari is to be granted. The portion of the rule specifically relating to the instant petition reads:

> A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor . . . The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons that will be considered . . . (b) when a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

Sup. Ct. R. 17.1. In the present case, the Georgia Supreme Court, the court of last resort in the State of Georgia, did not decide a federal question. It merely denied Adam Cab, Inc. d/b/a/ Adam Cab Company's (hereinafter "Adam Cab") application for discretionary review (See Petitioner's Appendix D). Accordingly, Adam Cab's argument that this Court should hear this case is without merit.

Adam Cab seems to argue that the Georgia Supreme Court's denial of Adam Cab's application for discretionary review decided a federal question because the denial finalized the order of the Superior Court of Chatham County, which ruled that Georgia Revenue Regulation 560-12-2-.84(7)(b) is constitutional. (See Order, Petitioner's Appendix C). Assuming *arguendo* that the Georgia Supreme Court's denial of Adam Cab's application

for discretionary review is a final decision, Adam Cab has still failed to show how the decision conflicts with another state court decision or a federal court of appeals decision.

Adam Cab cites cases from other states, including Minnesota, Wyoming, Florida and Alabama, as support for the existence of the conflict. However, as shown below, none of these cases addresses the constitutionality of a regulation similar to Georgia Revenue Regulation 560-12-2-.84(7)(b). Indeed, none of the cases involves issues similar to those in the instant case. Accordingly, Adam Cab's assertion of jurisdiction is without merit.

STATEMENT OF THE CASE[1]

Petitioner Adam Cab seeks review of the Chatham County Superior Court's Order dated October 29, 1991, which ruled that Revenue Regulation 560-12-2-.84(7)(b) is constitutional. The case had been remanded to the Chatham Superior Court to address the constitutional issues raised by Adam Cab, but not ruled upon by the trial court, in an earlier proceeding in which the Georgia

[1] The Georgia State Revenue Commissioner does not believe that a recitation of the facts is necessary. Should this Court grant Adam Cab's petition, the sole issue to be decided is the constitutionality of Georgia Revenue Regulation 560-12-2-.84(7)(b).

Supreme Court rendered a decision on other grounds. (See Petitioner's Appendix A).[2]

ARGUMENT AND CITATION OF AUTHORITY

Georgia Revenue Regulation 560-12-2-.84(7)(b) requires lessors and headquarters operators to collect sales taxes on fares collected for transportation of persons and to remit the taxes to the Georgia State Revenue Commissioner (hereinafter "the Commissioner"). Specifically, the role of the lessor and headquarters operator as agents of the State in the collection and remittance of sales tax is set forth as follows:

> Due to the likelihood that the State would otherwise lose tax funds due to the difficulty of policing the business operations of taxicab drivers because of the nature of the business, the lack of an office or regular place of business and the turnover of the drivers, headquarters operators and lessors of taxicabs shall collect the tax on fares for transportation of persons from their

[2] The Georgia Supreme Court has already ruled that the Commissioner was authorized, under Georgia Revenue Regulation 560-12-2-.84(7)(b), in placing the burden on Adam Cab to collect sales taxes from the taxi cab drivers to whom it leases taxi cabs and for whom it operates as a headquarters for remittance to the Commissioner. *Collins v. Adam Cab, Inc.*, 261 Ga. 305, 404 S.E.2d 560 (1991). However, Adam Cab also challenged the constitutionality of the regulation, and in division 2 of the opinion, the Georgia Supreme Court remanded the case to the trial court for resolution of the issue. *Collins v. Adam Cab, Inc.*, 261 Ga. at 307, 404 S.E.2d at 561.

> drivers as required above, and the term "headquarters operators" includes not only any person operating a headquarters for taxicabs and supervising or directing taxicab drivers, or receiving or relaying calls to cab driver members, but also any person or entity allowing use of the trade name of the headquarters or allowing any driver to hold himself out as being associated with the headquarters. The term "taxicab lessors" includes any person or entity leasing a vehicle to another person or entity for use as a taxicab.

Georgia Revenue Regulation 560-12-2-.84(7)(b). Adam Cab argues that the above-portion of the regulation unconstitutionally deprives taxicab companies of their property without due process of law. Specifically, Adam Cab contends that, under the regulation, Adam Cab is held liable for conduct of independent contractors over whom Adam Cab has no right or opportunity or authority to exercise control. The Commissioner maintains that a review of the relevant case law shows that the regulation at issue meets both procedural and substantive due process requirements.

With respect to procedural due process, it is well-established that the notice of assessment of the Commissioner issued to Adam Cab and the right to appeal, under O.C.G.A. § 48-2-59, to the Superior Court, provides for sufficient procedural due process. *Hodge v. Muscatine County, Iowa,* 196 U.S. 276 (1905); *Kennard v. State of Louisiana,* 92 U.S. 480 (1875).

With respect to substantive due process, federal case law indicates that the test of constitutionality is whether the method of regulation embodied in the statute bears a

reasonable relation to a constitutionally permissible object. *Ferguson v. Skrupa*, 372 U.S. 726 (1963).[3] In other words, the standard is one of "reasonable relationship." Applying this standard to the regulation at issue, it is clear that the regulation is valid.

Georgia Revenue Regulation 560-12-2-.84(7)(b), as well as Georgia's sales tax laws, is aimed at ensuring the collection and remittance of sales tax to the State – clearly a legitimate state interest. *See International Harvester Co. v. Wisconsin Dep't of Taxation*, 322 U.S. 435 (1944) (power to tax and collect taxes is included in states' inherent power of taxation). Regulation 560-12-2-.84(7)(b) seeks to achieve this legitimate objective, in an industry difficult to monitor, by imposing the burden of collecting and remitting sales tax on those persons who lease taxicabs to drivers or operate a headquarters for taxicab drivers. The Georgia Supreme Court noted the public policy and other concerns set forth in the regulation and the need to place the burden on the headquarters operators and for taxicab lessors to collect the tax from the drivers for remittance to the State Revenue Commissioner.[4] *Collins v. Adam Cab,*

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[3] This same test is used in the context of an equal protection challenge. *See Clark v. Jeter*, 486 U.S. 456 (1988). To the extent that Adam Cab may also be challenging the regulation on equal protection grounds, an equal protection challenge, like the due process challenge, is without merit.

[4] In the opinion, the Georgia Supreme Court also noted that a similar burden is placed by O.C.G.A. § 48-8-2(6)(G) on sellers of tangible personal property to persons for resale where there is a likelihood that the State will lose tax funds due to the difficulty of policing the business operations of the retailer. *Collins v. Adam Cab*, 261 Ga. at 306, 404 S.E.2d at 561.

Inc., 261 Ga. at 306, 404 S.E.2d at 561. Given that lessors of taxicabs and headquarters operators, such as Adam Cab, have daily contact with, and supervision over, taxicab drivers, it is certainly reasonable for them to be required to collect and to remit sales taxes to the State. *See International Harvester Co. v. Wisconsin Dep't of Taxation*, 322 U.S. at 443-44 (some practically effective device [is] necessary in order to enable the State to collect its tax); *Wells v. Malloy*, 402 F. Supp. 856 (D. Ver. 1975), *aff'd*, 538 F.2d 317 (2d Cir. 1976) (State tax collection procedure need only be fair and reasonable). Thus, the regulation is valid and Adam Cab's argument is without merit.

In support of its position, Adam Cab relies upon several cases in which Georgia appellate courts have held that a statute imposing liability based upon mere relationship between two parties is unconstitutional.[5]

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[5] In its brief, Adam Cab relies on *Frankel v. Cone*, 214 Ga. 733, 107 S.E.2d 819 (1959), which dealt with the constitutionality of a statute that imposed liability on a car owner for negligent acts caused by persons using the car for the benefit of the owner. The Court found that the statute violated due process by imposing liability on a car owner for injury caused by those driving the car without the owner's consent. Adam Cab also relies on *Corley v. Lewless*, 227 Ga. 745, 182 S.E.2d 766 (1971), which dealt with the constitutionality of a statute that imposed liability on a parent for willful and wanton acts of a minor child. The Court found that the statute violated due process by imposing liability on the parent solely on the basis of a parent-child relationship and even where the parent was entirely free from negligence or fault or had no knowledge of his child's tort. Adam Cab cites *Buchanan v. Heath*, 210 Ga. 410, 80 S.E.2d 393 (1954), which dealt with the constitutionality of a statute that required a railroad section foreman to pay

(Continued on following page)

However, these cases have nothing to do with the tax collection responsibility of taxicab headquarters operators and lessors. Further, these cases focus on liability absent consent or knowledge or based upon the existence of a relationship, such as parent/child. In contrast, in the instant case, Adam Cab is in the best position, due to its relationship, as either lessor or headquarters operator, to collect sales taxes from the drivers. Adam Cab can require the drivers, as a condition to the relationships, to collect the taxes from the passengers. If a specific driver refuses, Adam Cab could simply terminate that relationship.

Finally, Adam Cab seems to be arguing that the only way it can be held accountable for collection of sales taxes is to be in an employer/employee relationship with the taxicab drivers. Adam Cab relies upon *Cole v. Peachtree Cab Co.*, 121 Ga. App. 177, 173 S.E.2d 278 (1970). In *Cole*, the Georgia Supreme Court denied workers' compensation benefits to a taxicab driver, who rented a cab company's vehicle, because the cab driver was not an "employee" within workers' compensation law. In the case at bar, Adam Cab suggests that unless the cab driver is an employee as defined under workers' compensation law, Adam Cab should not be held liable for collection of

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(Continued from previous page)

damages to owners of stock that had been killed on his section if he failed to file a list of the marks and plans of the stock killed and irrespective of whether he had knowledge that the stock had been killed. The Court found that the statute violated due process because the section foreman was held liable automatically by virtue of this statute, regardless of whether the foreman was at fault.

tax. This argument is misplaced. It completely ignores the fact that Adam Cab enters into agreements with its drivers. Furthermore, the argument is a complete departure from Adam Cab's above argument that cites cases in which the courts refused to uphold statutes imposing liability based upon status or relationship, such as employer/employee. Citing the *Cole* decision, Adam Cab argues that unless there is an employer/employee relationship, Adam Cab should not be held liable for collection of taxes from its drivers.

Adam Cab claims that exercise of control over its drivers can exist only if its drivers are Adam Cab's employees. However, this Court has indicated that the label of "independent contractor" is not controlling in determining the constitutionality of a state's power to collect taxes from companies for which the independent contractors work. *Scripto v. Carson*, 362 U.S. 207 (1960) (the fact that salesmen working in taxing state are designated as "independent contractors" by foreign corporation is not controlling in determining if tax on corporation is constitutional).

As shown above, Adam Cab has presented inconsistent arguments to this Court. More importantly, Adam Cab has failed to show how being required to collect sales taxes is an unfair taking without due process.

Finally, Adam Cab claims that the Georgia Supreme Court has allowed to stand and remain in effect a judgment that is inconsistent with rulings of comparable matters in other states. Adam Cab cites several cases as support for its position, however, not one of these cases

addresses the constitutionally of a regulation similar to the one challenged by Adam Cab.

Adam Cab cites *Corbin v. Commissioner*, 240 N.W.2d 809 (Minn. 1976). In *Corbin*, the Minnesota Supreme Court decided that drivers/salesmen of a catering company were considered employees of the catering company and, thus, not required to remit sales taxes on snacks purchased from the catering company for resale. In *Fridlund Securities Company v. Minnesota Commissioner of Revenue*, 430 S.W.2d 154 (Minn. 1988), also cited, the Minnesota Supreme Court affirmed a lower court ruling that a taxpayer's metal sales were not "investment metal contracts," rather, they were taxable retail sales subject to Minnesota sales tax.

As support for its position, Adam Cab cites *Employment Security Commission of Wyoming v. Laramie Cabs*, 700 P.2d 399 (Wyo. 1985). Although *Laramie Cabs* involves cab drivers, the ruling is based upon the Court's interpretation of selected statutes in the Wyoming Employment Security law.

In *Noreiga v. Schnurmachar Holding, Inc.*, 528 So.2d 28 (Fla. 1988), the Court interpreted a Florida sales tax statute that imposes a tax on rental payments for real property, and the case involved a landlord/tenant dispute. Finally, in *Alabama v. Advertiser Company*, 337 So.2d 942 (Ala. 1976), the Court addressed whether sales tax was properly imposed, under a local ordinance, on the sale of newspapers from the publisher to its carriers. The ruling focuses on the interpretation of "wholesale sales" under Alabama sales tax law.

The five cases discussed above are cited by Adam Cab as supporting authority. However, none provides any authority to show that Georgia Revenue Regulation 560-12-2-.84(7)(b) results in an unfair taking without due process. Accordingly, Adam Cab's argument is without merit.

Given that Georgia Revenue Regulation 560-12-2-.84(7)(b) is reasonably related to a legitimate state objective and that Adam Cab has failed to demonstrate that the regulation lacks a reasonable basis, the regulation must be upheld. *See Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, *reh'g denied*, 411 U.S. 910 (1973) (there is a presumption of constitutionality in taxation classification scheme which can be overcome only by the most explicit demonstration that classification is a hostile and oppressive discrimination against particular persons and classes).

CONCLUSION

The Commissioner respectfully submits that this Court should deny Adam Cab's Petition for Writ of Certiorari.

Respectfully submitted,

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